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CASE No. 17,510

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In the Supreme Court of the United States.

October Term, 1900

Term No. 91

L. S. Clark, Plaintiff in Error,

vs.

The City of Titusville.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF DEFENDANT IN ERROR.

GEO. FRANK BROWN,
Counsel for Defendant in Error,
Titusville, Pa.

CASE NO. 17,810

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900

TERM NO. 325

L. S. CLARK, PLAINTIFF IN ERROR,

VERSUS

THE CITY OF TITUSVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYVANIA.

BRIEF OF DEFENDANT IN ERROR.

The City of Titusville is a city of the third class, governed by the provisions of the Act of Assembly of the State of Pennsylvania, approved May 23, 1889, P. L. 277; and by paragraph IV of Section 3 of Article V of the said Act, it is authorized and empowered to make ordinances for the following purposes among others, viz:

"IV. To levy and collect, for general revenue purposes, a license tax not exceeding one hundred dollars each, annually, on all auctioneers, contractors, druggists, hawkers, peddlers, produce or merchandise venders, bankers, brokers, pawn brokers, merchants of all kinds, persons selling or leaving goods upon installments, *grocers,* confectioners, butchers, restaurants, bowling alleys, billiard tables and other gambling

tables, drays, hacks, carriages, omnibuses, carts, wagons, street railway cars and other vehicles used in the city for hire or pay, lumber dealers, including commission men and all persons who make a business of buying lumber for sale at wholesale or retail, furniture dealers, saddle or harness dealers, stationers, jewelers, livery or boarding stable keepers, real estate agents, agents of fire, life or other insurance companies, market house companies, express companies or agencies, telegraph, telephone, steam heating, gas, natural gas, water, electric light or power companies or agencies, or individuals furnishing communication, light, heat or power by any of the means enumerated, *and to regulate the collection of the same.*"

The ordinance brought in question by this appeal, although enacted under the provisions of the unconstitutional Act of Assembly of the State of Pennsylvania, approved May 24, 1887, P. L. 196-204, was validated by the Act of May 13, 1889, and thus falls within the section of the Act of Assembly of the State of Pennsylvania governing municipalities, quoted above.

I.

The first two assignments of error, made by plaintiff in error, (*Record pages* 103 *and* 104), may well be considered together. Reduced to their more simple component parts, they attack the validity and constitutionality of the ordinance in question and allege it to be in conflict with the provisions of the fourteenth amendment of the Constitution of the United States for the following reasons:

1. It subdivided the merchants and tax-payers of the said city and their property into classes, so-called.

2. These classes differ not in kind but only in amount or value.

3. Levying or assessing upon each of such classes so created, taxes which do not operate uniformly upon the members of each class, because the lowest amount or value of property therein is required to pay the same amount of tax with the highest amount or value of property therein.

4. Levying or assessing upon each of said classes so created taxes which decrease in rate or ratio as the value of the class increases.

We shall examine these propositions in their order.

1. The first proposition brings us quickly to the question of classification in matters of taxation, but more directly to the nature of the tax under discussion. It will be seen that the plaintiff in error assumes throughout the several propositions the fact that *this is a tax on property*—his whole case is founded upon this theory. We, on the contrary, hold the tax in question to be a *license tax*—a tax on "property estimated by the volume of the annual sales"—*not* a tax on property.

The plaintiff in error seems to be unable to comprehend there is a distinction of this sort, recognized by the courts. A license tax is not a property tax. A business tax is not a property tax even though it be levied for general revenue purposes.

Morehouse *v.* Brigham, 41 La. Ann., p. 665.
Denver City R. Co. *v.* Denver, 29 L. R. A., p. 608, 611.
Davis *v.* Macon, 64 Ga., p. 128.
Newton *v.* Atchison, 31 Kan., p. 151.
Williamsport *v.* Wenner, 172 P. S., p. 173, 181.
Oil City *v.* Trust Company, 151 P. S., p. 454.

A very little thought will convince one that the stock of merchandise of two different or even two similar businesses can have no logical relation or ratio to their respective *volume of annual sales.* Yet if the proposition of plaintiff in error be carried to its logical conclusion, the tax in question is but a mere *tax on personal property.* This is the inherent and continuing fallacy in the theory of the plaintiff in error, Clark.

The distinction between a tax on property and taxation similar, yet distinguishable from it, has been inferentially drawn many times by this Court, notably in Magoun *v.* Illinois Trust & Savings Bank, 170 U. S., p. 283, 287, 301, where the court distinguished between *a tax upon property* and *a tax upon the succession to an estate.*

Dow *v.* Beidelman, 125 U. S., p. 260.

Chicaga R. R. Co., *v.* Iowa, 94 U. S., p. 164.

Having fixed the tax to be an act of general taxation, distinguishable from a tax on property and to be designated as *a business tax, a license tax,* or, in the words of the Supreme Court of the State of Pennsylvania, a tax on "property estimated by the volume of the annual sales," we shall consider whether the classification adopted creates bona-fide classes, or simply as insisted upon by the assignments of error "so-called classes."

The classification complained of will be found in the *Record* from page 59 to page 67; but on page 83 of the *Record*, Judge Thomas in the opinion of the lower court, has arranged it in tabular form. The classification principally objected to is that of retail business.

As a general proposition, a municipality has the right to classify, grade and fix the rate of taxes in the nature of a license tax made by it, within the limits fixed by its charter or other statutory provision, (Kniper *v.* Louisville, 7 Bush. p. 599) and within the limits fixed by the Federal and State Constitutions.

So far as this classification being within the limits of the provisions of the Constitution of the State of Pennsylvania there is no further controversy. That question has been set at rest by the decision of both the Supreme and Superior Courts of that state. (Record page 93, and page 102.)

Forsythe *v.* Hammond, 166 U. S. 519.

The Constitution of the United States permits classification of subjects of taxation on a proper basis and in a proper manner. The only restraint imposed by the fourteenth amendment is that unequal taxes may not be imposed upon property of the same kind, in the same class, in the same condition and used for the same purpose.

Kentucky R. R. Tax Cases, 115 U. S., p. 321.

Giozza *v.* Tiernan, 148 U. S., p. 657, 662.

Hayes *v.* Missouri, 120 U. S., p. 68.

Barbier *v.* Connelly, 113 U. S., p. 32.

Pacific Express Co. *v.* Siebert, 142 U. S., p. 339, 351.

2. The classification is a grading of different kinds—in that different volumes of business are grouped together. Again it must be impressed that it is not the merchants, the taxpayers or their property which it classified, but the business according to its volume—"the volume of annual sales."

Classification according to the amount of business done has been frequently recognized by the Federal Courts.

Dow *v.* Beidelman, 125 U. S., p. 690.

Chicago R. R. Co. *v.* Iowa, 94 U. S., p. 164.

3. It is not contended by the defendant in error that the classification adopted in this ordinance of the City of Titusville produces absolute equality, and it not expected of the City Councils, nor of any other legislative body levying taxes, that they shall produce absolute equality in their measures. Indeed it has been asserted in Commonwealth *v.* Delaware Division Canal Co., 123 P. S., page 620, in passing upon the constitutional provisions relating to taxation: "Absolute equality is of course unattainable; a mere approximate equality is all that can reasonably be expected. A mere diversity in the methods of assessment and collection, however, if these methods are provided by general laws, violates no rule of right, if when these methods are applied the results are practically uniform. If there is a substantial uniformity, *however different the procedure*, there is a compliance with the constitutional provisions. Fox's App., 112 Pa., 353; *even when there may be some disparity of results*, if uniformity is the purpose of the legislature, there is a substantial compliance. Hunter's App., 18 W. N., 411, 394; Loughlin's App., 19 W. N., 517."

And further on in the same opinion, at page 623, it is well said by the learned Judge: "The moment we concede the power to classify we have disposed of the question of uniformity, for then all that is required by the constitution is that the taxes shall be uniform upon the members of a class." And in Kittanning Coal Co. *v.* Commonwealth, 79 Pa., p. 105,

Chief Justice Agnew used almost identically the same language: "It is clear, therefore, that the moment we concede the power to classify, we have disposed of the constitution of uniformity, for then all that is required by the constitution is uniformity of taxes among the mmbers of a class."

Again plaintiff in error relies wholly on the favorite theory that property is being and has been classified for purposes of taxation. Taking out that prop, the proposition has not a legal leg to stand upon.

4. The fourth proposition is very nearly akin to the third proposition. Again the idea of a classification of property intrudes itself. Whether the taxes "decrease in rate or ratio as the value of the class increases" or increases in rate or ratio as the class becomes larger, as was the case in Magoun v. Trust Company, *supra*, what difference is there in the legal principle involved? The fact yet remains, each class is taxed separately and independently and without discrimination existing in the same class.

II.

The third assignment of error attacks the validity of the ordinance and desires it declared unconstitutional and in conflict with the fourteenth amendment to the Constitution of the United States because "all the so-called classes erected by the said ordinance by value or quality of business or property are but subdivisions of a class" and impose "taxes upon such subdivisions without regard to a common ratio either as between the several subdivisions themselves or as between the members of each of the said subdivisions." Eliminating from this proposition the idea of "classes erected, by value ..... or property," and the question of the right to classify—both of which ideas are contained in the first two assignments of error, and also eliminating the idea of a common ratio between members of a class which is the life of the second assignment of error, and then we have this naked proposition—the rates of the tax on different classes must bear some relation or ratio to each other. This proposition is absolutely denied.

In Magoun *v.* Illinois Trust and Savings Bank, *supra*, the Illinois inheritance tax law of June 15, 1895, came under the scrutiny of the Supreme Court on constitutional objections. This statute classified inheritors into three classes of near relatives, remote relatives and strangers, imposing a different rate of taxation as to each of these classes, and beyond this classification the statute provided that as to the third class, that is, strangers, the rate of taxation should vary with the amount of the estate. This was a progressive tax, so called, wherein the rate of taxation was increased as the amount of the legacy passes from one sum to another, the rates bearing no "relation or ratio to each other." Thus the statute provided, *inter alia*, that upon a legacy over fifty thousand dollars, the rate should be six per cent., while upon one under ten thousand it was but three per cent. The Court, speaking by Justice McKenna, affirmed the constitutionality of the act, passing expressly upon the question of classification involved, and said: "The clause of the Fourteenth Amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it "only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky Railroad Tax cases* 115 *U. S.*, 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes v. Missouri* 120 *U. S.* 68 * * It may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference with this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County v. Kimball*, 102 *U. S.*, 691

that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: "It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessary an objection to their constitutional validity." The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have *the attribute of equality of operation*, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons *according to their relations.*"

Again in *Magoun v. Illinois Trust and Savings Bank, supra*, the right from the Federal standpoint to tax the classes differently and independently was fully recognized. At this point the court said with reference to this subject: "There are four classes created, and manifestly there is equality between the members of each class. *Inequality is only found by comparing the members of one class with those of another.* It is illustrated by appellant as follows: One who receives a legacy of $10,000 pays 3 per cent., or $300, thus receiving $9,700 net; while one receiving a legacy of $10,001 pays 4 per cent. on the whole amount, or $404.04, thus receiving $9,600.96, or $99.04 less than the one whose legacy was actually $1.00 less valuable. This method is applied throughout the class.

"These, however, are conceded to be extreme illustrations, and we think, therefore, that they furnish no test of the practical operation of the classification. When the legacies differ in substantial extent, if the rate increases the benefit increases to greater degree.

"If there is unsoundness it must be in the classification. The members of each class are treated alike—that is to say, all who inherit $10,000 are treated alike. There is equality therefore within the classes. If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount, but varies with the amount arbitrarily fixed, and hence

that an inheritance of $10,000 or less pays 3 per cent., and that one over $10,000 pays not 3 per cent. on $10,000 and an increased percentage on the excess over $10,000, but an increased percentage on the $10,000, as well as on the excess, and it is said as we have seen, that in consequence one who is given a legacy of ten thousand and one dollars by the deduction of the tax receives $59.04 less than one who is given a legacy of $10,000. *But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment.* That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

This latest authoritative decision on the equality clause of the Fourteenth Amendment is recognized as setting at rest the legal objections to classification as viewed from the Federal standpoint, and it follows very aptly the numerous decisions of the Supreme Court of the United States leading up to it, and, being a decision upon the general subject of taxation, it is the more pertinent to the case at bar. The Supreme Court had before declared that the Fourteenth Amendment was not intended to compel the state to conform to an iron rule of equal taxation. Bell's Gap R. R. Co. v. Pennsylvania, *supra;* Giozza v. Tiernan, *supra*, and in State Railroad Tax Cases, 92 U. S., p. 575, 612, it was held: "Perfect equality and perfect uniformity of taxation as regards individuals or corporations, *or the different classes of property subject to taxation*, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which may be devised, must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect."

In the Kentucky R. R. Tax cases, 115 U. S., p. 321, 337, Mr. Justice Matthews said: "The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

And in Giozza v. Tiernan, 148 U. S., p. 657, 662, Chief Justice Fuller said, in construing the Fourteenth Amendment: "It is enough that there is no discrimination in favor of one as against another of the same class."

The only restraint imposed by the Fourteenth Amendment is that unequal taxes may not be imposed upon property of the same kind, in the same class, in the same condition, and used for the same purpose.

In Hayes v. Missouri, 120 U. S., p. 68, a statute of the State of Missouri was considered which provided that in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the state it is allowed in such cases only eight peremptory challenges, and it was held that the statute does not deny to a person accused and tried for murder in a city containing over 100,000 inhabitants the equal protection of the laws enjoined by the Fourteenth Amendment of the Constitution, and that there was no error in refusing the state's peremptory challenges to eight. And Justice Field said:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

In Barbier v. Connelly, 113 U. S., p. 32, it was said by Justice Field, in construing the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which is carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

And in Pacific Express Co. v. Seibert, 142 U. S., 339, 351, the Court, through Mr. Justice Lamar, said: "This Court has repeatedly laid down the doctrine that diversity of taxation,

both with respect to the amount imposed and the various species of property selected either for bearing its burdens or from being exempt from them, is not inconsistent with a perfect uniformity, and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens." And it was said in Merchants' Bank v. Pennsylvania, 167 U. S., 461: "Indeed, this whole argument of a right under the Federal Constitution to challenge the tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in Bell's Gap Railroad v. Pennsylvania."

III.

The fourth and fifth assignment of errors are general propositions embracing and following the first three and have been answered in the preceeding brief.

In concluding this brief of argument we desire to give two two more citations. In his dissenting opinion in Magoun v. The Illinois Trust and Savings Bank, *supra*, Mr. Justice Brewer said: "Of course absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation, does not prove its unconstitutionality. (Merchants Bank v. Pennsylvania, 167 U. S., 461), but when a tax law directly, necessarily and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality, thus *intentionally created*, can find any constitutional justification."

In the opinion of the court in the same case 170 U. S., p. 294. Mr. Justice McKenna said: "The state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course, 'Clear and hostile discrimination against particular persons or classes, especially as are of un-

usual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition, said Mr. Justice Bradley, in Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, 237.' "

Upon these equally clear citations of authority we would rest our cause and it is respectfully contended that the ordinance comes within the constitutional limitations.

Geo. Dent Brown,
For Dft. in Error.